

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 18 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0367-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JASON JOHNATHAN LEWIS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR59218

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Jason J. Lewis

Winslow
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Jason Lewis, a.k.a. Jason Jonathan Matthews, seeks review of the trial court’s order denying a successive petition for post-conviction relief he had filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged ineffective assistance of counsel. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Lewis has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in 1998, Lewis was convicted of first-degree murder and kidnapping and was sentenced to a natural-life term of imprisonment and a concurrent 10.5 year prison term. This court affirmed his convictions and sentences on appeal and denied relief on his first petition for post-conviction relief, which had been consolidated with the appeal. *State v. Matthews*, Nos. 2 CA-CR 98-0383, 2 CA-CR 00-0155-PR (consolidated) (memorandum decision filed Apr. 24, 2001). Lewis sought post-conviction relief a second time and the trial court denied relief. He petitioned for review in this court, and we denied relief as well. *State v. Matthews*, No. 2 CA-CR 2004-0062-PR (decision order filed Nov. 23, 2004).

¶3 Lewis thereafter initiated his third Rule 32 proceeding, arguing in his petition that he had “received ineffective assistance of trial counsel” and was entitled to relief under Rule 32.1(e)(2) and (f), based on counsel’s having advised him to reject a plea offer. The trial court summarily denied relief, concluding, inter alia, that Lewis’s claim was precluded under Rule 32.2(a)(3) because, although he had raised other claims of ineffective assistance of counsel in his first petition for post-conviction relief, he had not included this claim.

¶4 In his petition for review, Lewis makes substantially the same arguments as he did below, but also argues the trial court erred in concluding his claim was precluded because he had not “knowingly, voluntarily and intelligently foregone the right to raise his claim.” Quoting from a pre-1992 version of Rule 32.2 and the comments thereon, Lewis argues the rule only ““seeks to preclude petitions on grounds purposefully not raised at trial, on appeal or on a previous petition.”” And he argues he did not purposefully or knowingly, voluntarily and intelligently “forego[] the right to raise his claim.”

¶5 Rule 32.2, however, was amended in 1992, and the requirement that a claim be “[k]nowingly, voluntarily and intelligently not raised” in order to be precluded was stricken. *See* 170 Ariz. LXVII (1992). The comment to the current version of the rule explains that although “that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors.” Ariz. R. Crim. P. 32.2 cmt. “Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant’s personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved,” in other words, if the “claim is of sufficient constitutional magnitude.” *Id.*; *see also Swoopes*, 216 Ariz. 390, ¶ 21, 166 P.3d at 951.

¶6 Lewis has not explained why his claim is of sufficient constitutional magnitude to require his personal waiver, *see* Ariz. R. Crim. P. 32.9(c)(1), and we agree with the trial court that Lewis’s claim is precluded because he failed to raise it in his first petition for post-conviction relief, *see Swoopes*, 216 Ariz. 390, ¶¶ 22, 24, 166 P.3d at

952, 953 (“The ground of ineffective assistance of counsel cannot be raised repeatedly.”), *quoting Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002). Thus, although we grant the petition for review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge